92-1509

Supreme Court, U.S.
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MAR 17 1993
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No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1992

JAMES GREENE, LOU BYRON, AND THE JEFFERSON COUNTY SHERIFF'S OFFICE
*Petitioners*

*v.*

JOYCE BENFIELD, et al, *Respondents*

***PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT***

DOUGLAS H. MORRIS
Oldfather & Morris
1 Mezzanine, Morrissey Bldg
304 West Liberty Street
Louisville, Kentucky 40202
(502) 589-5500
*Counsel of Record*

JAMES O. BARRETT
Oldfather & Morris
1 Mezzanine, Morrissey Bldg
304 West Liberty Street
Louisville, Kentucky 40202
(502) 589-5500
*Counsel for Petitioners*

## QUESTIONS PRESENTED

1) Whether the Sixth Circuit may refuse to consider the merits of a petition for mandamus seeking to vacate a federal district court's order remanding an action to state court when the action was providently removed under federal question jurisdiction.

2) Whether a federal district court may remand a case providently removed from state court under federal question jurisdiction, when the plaintiffs dismissed their Title VII claims while retaining their substantially identical state Civil Rights Act claims, without recognizing that forum manipulation is a legitimate countervailing factor in considering whether to remand.

## LIST OF PARTIES

The parties to the proceedings below were the Petitioners (Defendants) James Greene, Lou Byron, and the Jefferson County Sheriff's Office and the Respondents (Plaintiffs) Joyce Benfield, Tina Gibbs, Betty Waldridge, Joan Ball, Gloria Mattingly, who are also Respondents before this Court. (Defendant Ronnie Wall was not a party to the proceedings in the Sixth Circuit and is not a party to the proceedings before this Court.)

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Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) . . . . . 7-11


### Statutes Cited


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28 U.S.C. § 1446 . . . . . 2
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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1992

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JAMES GREENE, LOU BYRON, AND THE JEFFERSON COUNTY SHERIFF'S OFFICE, *Petitioners*

*v.*

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***PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT***

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**OPINIONS BELOW**

The opinion of the Court of Appeals for the Sixth Circuit has not been reported, and is reprinted in the Appendix hereto, p. 21-A, infra.

The memorandum opinion of the United States District Court for the Western District of Kentucky (Gambill, M.J.) has

not been reported, and is reprinted in the Appendix, hereto, p. 3-A, infra.

**JURISDICTION**

Respondents filed suit in Kentucky state court claiming violation of Title VII, the Kentucky Civil Rights Act, and intentional infliction of emotional distress. Petitioners removed the action to federal district court under federal question jurisdiction pursuant to 28 U.S.C. § 1446. The Western District of Kentucky remanded the action to Kentucky state court. Petitioners' mandamus petition to the Sixth Circuit was denied on December 18, 1992. No rehearing was sought.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

28 U.S.C. § 1447. **Procedure after removal generally.**

(a) In any case removed from a state court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the state court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such state court or may cause the same to be brought before it by writ of certiorari issued to such state court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the state court. The state court may thereupon proceed with such case.

(d) An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal on otherwise.

## STATEMENT OF THE CASE

Petitioner Lou Byron is a former deputy sheriff of Jefferson County, Kentucky. Petitioner James Greene is the Sheriff of Jefferson County, Kentucky.[1] Respondents are employees of the Jefferson County Sheriff's office.

Respondents' complaint alleged sexual harassment in violation of Title VII, the Kentucky Civil Rights Act, and intentional infliction of emotional distress. On July 2, 1992, Defendants removed the action to federal district court. The action was assigned to a Magistrate Judge for determination of all non-dispositive matters pursuant to 28 U.S.C. § 636(d)(1)(A) and (B).

On July 14, 1992, Plaintiffs moved the district court to remand to state court, raising several arguments alleging improvi-

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[1] Defendant Ronnie Wall is a deputy sheriff, a defendant in the action below, who has not joined in this Petition.

dent removal. However, the Magistrate Judge held that the action was providently removed. (Appendix, pp. 5-A to 8-A). Alternatively, Plaintiffs conditionally offered to dismiss their Title VII harassment claim (while retaining their Kentucky Civil Rights Act harassment claim) if the district court would agree to remand. Petitioners opposed this, arguing that the Plaintiffs' dismissal of one, and retention of the other, substantially identical state claim was forum manipulative on its face.[2]

The Magistrate Judge agreed to the Plaintiffs' arrangement and ordered remand conditional upon the Plaintiffs' dismissal

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[2] The dispositive provisions of the Kentucky Act and Title VII are so similar that the Kentucky courts have stated:

> United States Supreme Court decisions regarding the federal provisions are most persuasive, if not controlling, in interpreting the Kentucky statute. Kentucky Commission on Human Rights v. Commonwealth of Kentucky, 586 S.W.2d 270, 271 (Ct. App. 1979).

of their Title VII claim, concluding that "it is no more manipulation to argue for remand than it is to originally remove the action from state court to federal court." The Magistrate Judge also found that the Sixth Circuit "has moved away from the position that the court has discretion to retain jurisdiction over a pendent state claim where the federal claim has been dismissed before trial," citing, Service Hospital Nursing Home and Public Employees Union, Local No. 47 v. Commercial Properties Services, Inc., 755 F.2d 499, 506, n. 9 (6th Cir. 1985), cert. denied 474 U.S. 850 (1985). The Magistrate Judge concluded that this policy and the application of the traditional balancing factors required remand. (Appendix, p. 19-A).

Petitioners' mandamus petition sought to vacate the remand order. The Sixth Circuit, by order entered December 18, 1992, held that review of the merits of the

mandamus petition was unavailable because mandamus "cannot be used to control a district court in the exercise of its discretionary duties. (Appendix, pp. 25-A to 26-A).

## REASONS FOR GRANTING WRIT

### I.

**The Sixth Circuit's refusal to consider a mandamus petition seeking to vacate the remand of a providently removed action and the Sixth Circuit policy of remand conflicts with the decisions of this Court.**

The Sixth Circuit declined to address the merits of the Petitioners' mandamus petition, stating that:

> The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. It cannot be used to control a district court in the exercise of discretionary duties. The Defendants have not demonstrated a clear and indisputable right to the relief they seek. The Court, therefore, concludes that mandamus relief is not warranted. [citations omitted] (Appendix pp. 24-A to 25A).

In contrast, in Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) this Court held that mandamus was appropriate to review the remand of providently removed actions, stating that:

> "There is nothing in our later cases dealing with the extraordinary writs that leads us to question the availability of mandamus in circumstances where the district court has refused to adjudicate a case; and has remanded it on grounds not authorized by the removal statues. On the contrary, these cases would support the use of mandamus to prevent nullification of the removal statutes by remand orders resting on grounds having no warrant in the law." [citations omitted] Id, at 352-53.

The removal statute, 28 U.S.C. § 1447, only authorizes remand if the action was improvidently removed. It is well settled that the 28 U.S.C. § 1147(d) prohibition against the review of remand orders only applies to the remand of cases which were improvidently removed. Thermtron, supra, 423 U.S. at 353-53. It is indisputable that this case was providently removed.

Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988), narrowed Thermtron by holding that a district court has discretion to remand pendent claims where the federal claim is dismissed,[3] impliedly affirming the availability of mandamus to review such a remand by the very fact that the judgment reviewed in Carnegie-Mellon was the disposition of a petition for mandamus.

The conflict created by the Sixth Circuit's refusal to follow Thermtron is exacerbated by its "policy" of remanding--by its having "moved away from the position that the court has discretion to retain jurisdiction over a pendent state claim where the federal claim has been dismissed before trial." Service Hospital Nursing

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[3] That discretion is guided by the diversity pendent claims factors of Mine Workers v. Gibbs, 383 U.S. 715 (1966). However, Carnegie-Mellon cautioned that federal question cases require consideration of an additional factor: forum manipulation. Carnegie-Mellon, 484 U.S. at 357.

Home and Public Employees Union, Local No. 47 v. Commercial Properties Services, Inc., supra, 755 F.2d at 506, n. 9.

The result is that the Sixth Circuit has created a presumption of remand, arguably mandatory, in either event a presumption in derogation of the Carnegie-Mellon test and it cloaks the presumption in non-reviewability--in derogation of both Thermtron and Carnegie-Mellon.

II

**Both the Magistrate Judge's refusal to consider forum manipulation as a countervailing factor in remanding and the Sixth Circuit's positions regarding review present important questions for the orderly administration of justice and the viability of the right of federal question removal.**

If the Magistrate Judge is correct that it is no more manipulation to argue for remand than to remove to federal court, *ipso facto*, no remand can be manipulative. This result is plainly contrary to Carnegie-Mellon's admonition to guard against forum manipulation by refusing to

remand pendent claims where appropriate, (although it is worth noting that no precedent defines forum manipulation).

If forum manipulation is ever to be considered as a factor, it should be in this case, where the Respondents admitted they were motivated by forum preference.[4] No other rationale can explain the dismissal of one sexual harassment claim and the retention of another, where the elements of proof of both are substantially identical.

Several factors bear emphasis as to the importance of a resolution of these issues. First, the frequency in which this situation can arise is significant. Every federal statute under which state courts have concurrent jurisdiction, when the state has an analogous statute (Title VII

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[4] In their motion to remand they stated that they preferred a state forum because of the congestion of the federal court docket (a consideration specifically condemned by Thermtron) and they felt the voters of Jefferson County should hold their own elected official accountable.

and the Age Discrimination in Employment Act to name a few) creates the potential for this kind of abuse.

Second, if these Plaintiff's tactics are permissible, all such litigants, as well as the state and federal court systems, are exposed to extraordinarily wasteful and unnecessary manipulations.[5]

Finally, these maneuvers are demeaning to the litigants and the courts. Bartering claims for forums legitimizes the use of legal process as a ploy and renders federal question removal jurisdiction a sham. It gives plaintiffs an unrestricted (apparently unreviewable) right to litigate federal claims only in state court, as they may file charges of violation of federal

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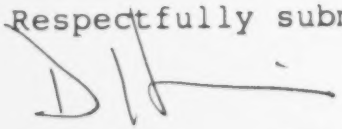
[5] In this case alone, 35 pleadings and orders were filed in federal court after removal, none of which would have been necessary had the Respondents either anticipated their forum preference by omitting the Title VII claim from their original complaint or resigned themselves to removal.

and state statutes, then discard the federal question and remand whenever an action is removed and they perceive a tactical advantage in the state forum.

**CONCLUSION**

For the reasons stated above this petition should be granted. If this Petition is granted, Petitioners will respectfully request the matter be remanded to the Sixth Circuit with directions to enter mandamus requiring the district court to vacate its order remanding the action to state court.

Respectfully submitted,



DOUGLAS H. MORRIS
Oldfather & Morris
1 Mezzanine, Morrissey Bldg
304 West Liberty Street
Louisville, Kentucky 40202
(502) 589-5500
*Counsel of Record*

JAMES O. BARRETT
Oldfather & Morris
1 Mezzanine, Morrissey Bldg
304 West Liberty Street
Louisville, Kentucky 40202
(502) 589-5500

*Counsel for Petitioner Lou Byron*

RONALD L. COOK
619 Marion E. Taylor Building
Louisville, Kentucky 40202
(502) 583-2646
*Counsel for Petitioner Jefferson County Sheriff's Office*

GEORGE SALEM, JR.
Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 583-4881
*Counsel for Petitioner James Greene*

**APPENDIX**

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

**CIVIL ACTION NO. C-92-0380-L(M)**

**JOYCE BENFIELD, ET AL.** **PLAINTIFFS**
**V.**
**JAMES GREEN, ET AL.** **DEFENDANTS**

**ORDER**

The plaintiffs having timely filed their motion to dismiss their Title VII claim and the Court being otherwise sufficiently advised,

IT **IS HEREBY ORDERED** that the plaintiffs Title VII claim be and hereby is dismissed.

IT **IS FURTHER ORDERED** that the action **be** and hereby is remanded to state court and the Clerk of the Court is directed to notify the Jefferson Circuit Court of the remand.

Dated this 21st day of September 1992.

[ SIGNED ]

**CHARLES M. ALLEN, SENIOR JUDGE FOR**
**RONALD E. MEREDITH, CHIEF JUDGE**
**UNITED STATES DISTRICT COURT**

cc: Counsel of Record
**ENTERED**
SEPT 21 1992
JESSE W. GRIDER, CLERK
By DEPUTY CLERK, L. GRIMES

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

**JOYCE BENFIELD, ET AL.** **PLAINTIFFS**

**vs.** **CIVIL ACTION NO. C92-0380-L(M)**

**JAMES GREENE, ET AL.** **DEFENDANTS**

**ORDER**

This matter is before the Magistrate Judge on the motion of the plaintiffs pursuant to 28 U.S.C. § 1447(c) to remand this action to the Jefferson Circuit Court (Docket No. 11). Defendants have responded (Docket Nos. 18, 19). Plaintiffs have replied (Docket No. 21). Accordingly, the motion is now ripe for consideration.

The motion of the plaintiffs to remand is based on two factors: (1) the plaintiffs desire for a prompt judicial resolution of their allegations; and (2) their belief that the issues raised in

their suit "should be resolved by a jury of Jefferson County voters who will hold the elected and appointed officials of the Jefferson County Sheriffs office accountable for their conduct." (Docket No. 11, p. 1).

Plaintiffs argue in support of their motion that the defendants have failed to comply with the jurisdictional requirements of 28 U.S.C. § 1446(a) by their failure to attach a copy of the temporary restraining order entered by Judge Ken Corey on June 5, 1992, to their petition for removal. Alteratively, plaintiffs argue that the District Court has discretion to remand the entire case, or the pendent state claims, pursuant to Carnegie -Mellon University v. Cohill, 484 U.S. 343 (1988). Plaintiffs also offer to dismiss their federal claim pursuant to 42 U.S.C. § 2000(e) to eliminate the

jurisdictional ground for removal (Docket No. 11, p. 3).

Upon consideration, the Magistrate Judge **grants** the motion of the plaintiffs to remand. While neither of the two factors mentioned by the plaintiffs is persuasive, and the failure of the defendants to attach a copy of the state's temporary restraining order is not a jurisdictional defect, the Magistrate Judge concludes that the traditional criteria of fairness, judicial economy, convenience and comity, require remand following dismissal of the federal claim.

The first question is whether the defendants' failure to attach a copy of the restraining order to the petition for removal requires remand. The removal procedural requirements of 28 U.S.C. § 1446(a) require only that the petition have attached "a copy of all process, pleadings and orders **served** upon him or them in such

action." 28 U.S.C. § 1446(a) (1973) (emphasis added). The restraining order was entered ex parte, and apparently, was not served. Therefore, the literal language of the statute does not require that the order accompany the petition for removal. Usatorres v. Marina Mercante Nicaraguenses, 768 F.2d 1285 (11th Cir. 1985) because motion to quash service of process in state court was not served on defendant who sought removal, there was no requirement defendant file motion with the district court).

More significantly, the omission of the order is not a jurisdictional defect. The purpose of the statute is to ensure that the District Court has before it all documents essential to determining its jurisdiction at the time of removal. See Pennsylvania v. Leeman, 66 N.E. 48 (Ind. 1903). A temporary restraining order is not a pleading that establishes the

jurisdiction of the federal courts. Therefore, while a plaintiff may move to remand for a procedural irregularity in the removal process; in general, such defect, if it does not lead to doubt of federal jurisdiction, is curable. Brown Bros. Cypen Corp. v. Carner Bank of Miami Beach, Fla., 287 F.Supp. 700 (S.D. N.Y. 1968); Kramer v. Jarvis, 81 F.Supp. 360 (D.C Neb. 1948). See also First National City Bank v. Nanc, Inc., 437 F.Supp. 184 (S.D. N.Y. 1975) (failure of defendants to include with their petition exhibits to the complaints, including the loan agreement with its forum selection clause, was not a jurisdictional defect and did not warrant remand).

The restraining order in question has been put before the Court by the plaintiff. The Magistrate Judge has ruled that this restraining order remains in

effect. 28 U.S.C. § 1450.[1] Therefore, any defect is cured.

The next question involves the discretion of the District Court to remand the present action. Plaintiffs argue that even if their Title VII claim is not dismissed, this Court has discretion pursuant to Carnegie -Mellon, supra, to remand their federal and pendent state claims. The Magistrate Judge disagrees. Carnegie- Mellon does not hold that a federal district court has unbounded discretion to remand otherwise properly removed federal claims. The decision, instead, addresses those actions in which the federal claim has been dismissed, and only the pendent state claims remain.

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[1] The Magistrate Judge previously directed the parties to address the question of whether 28 U.S.C. § 1450 required the district court to continue to give effect to the state restraining order. No legal memoranda were filed on this issue. Accordingly, the Magistrate Judge rules for the plaintiffs on this point.

In such situations, the district court has discretionary jurisdiction over the removed state law claims, and may chose not to exercise its jurisdiction. Carnegie-Mellon, 484 U.S. at 355. See Hughes v. Ohio Bell Tele. Co., 916 F.2d 367, 372 (6th Cir. 1990). ("Cohill simply gives the district court discretion to remand a case if the federal claim is dismissed and only the pendent state claims remain.")

Further, the same argument was specifically rejected in Thermtron Products, Inc, v. Hermansdorfer, 423 U.S. 336 (1976). In Thermtron Products, the Supreme Court held that a district court may not remand a removed case without specific statutory authorization. The facts of Thermtron are particularly relevant. In Thermtron, the district court remanded an action due to its congested docket (one of the two reasons suggested by

the present plaintiffs). The question at issue was whether the district court could remand an otherwise properly removed case for reasons not authorized by federal statute. The Supreme Court held that: "Because the district judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power and issuance of the writ of mandamus was not barred. ..." Beard v. Carrollton RR, 893 F.2d 117, 121 (6th Cir. 1989) (citing Thermtron Products, 423 U.S. at 351). In short, the district court has no discretion simply to remand an otherwise properly removed federal claim. Neither congestion of the court docket, nor a desire for a state jury, is a proper basis for remand.

This conclusion brings us to the final issue. Plaintiffs have offered to dismiss their federal claim, and argue that dismissal of this claim justifies remand to

the state court pursuant to Carnegie-Mellon. Defendants respond that while Carnegie-Mellon gives this Court the discretion to remand, the plaintiffs' attempt to remand is merely a bald attempt to manipulate the jurisdiction of the federal courts. Defendants support this argument by pointing out that although the plaintiffs have offered to dismiss their federal Title VII claim, they have not offered to dismiss the state counterpart under the Kentucky Civil Rights Act, KRS Chapter 344, et seq. Defendants also argue that even if this Court does not find any attempt by the plaintiffs to manipulate federal jurisdiction, a weighing of the traditional criteria for remand requires the Magistrate Judge to deny the plaintiffs' motion.

These arguments compel the Magistrate Judge to return to Carnegie-Mellon v. Cohill. The import of Carnegie-

Mellon was recently discussed in Monks v. Marlinga, 923 F.2d 423 (6th Cir. 1991), wherein the Sixth Circuit explained:

> [I]n Carnegie-Mellon v. Cohill, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed .2d 720 (1988), the Supreme Court ruled that a federal court need not dismiss state claims when all federal claims have been eliminated. Although the federal court may decline to exercise jurisdiction, the rule is not mandatory, but, instead, may be applied flexibly in all cases. Id. at 350, 108 S.Ct. at 618-19. The federal court must balance concerns of judicial economy, convenience, fairness and comity. Id.

Monks, 923 F.2d at 426.

Although the Carnegie-Mellon decision indicates that remand upon dismissal of the federal claim is discretionary, it should be noted that the case law of this Circuit strongly favors remand when the basis of federal jurisdiction no longer exists.

For example, in Service Hospital Nursing Home and Public Employees Union, Local No. 47 v. Commercial Properties Services, Inc., 755 F.2d 499, 506, n.9 (6th Cir.), cert.

den., 474 U.S. 850 (1985), the Sixth Circuit held that: "This Circuit has moved away from the position that the court has discretion to retain jurisdiction over a pendent state claim where the federal claim has been dismissed before trial." See also Henry v. Metro. Sewer District, 922 F.2d 332, 335, n.2 (6th Cir. 1990).

Keeping in mind the policy of the Sixth Circuit, and the traditional balancing test, the Magistrate Judge concludes that upon dismissal of the plaintiffs' federal claim, remand of this action is necessary, as well as appropriate. The Magistrate Judge reaches this conclusion for several important reasons. First, all factors of the traditional balancing test favor remand. Judicial economy will not be thwarted by remand. The present case was removed to federal court only one month ago on June 30, 1992. The District Court has not yet invested substantial judicial

resources in the action. Second, remanding the action to state court will not inconvenience any party. All parties to this action are located in Louisville, Kentucky. A remand, in practical terms, simply means a shorter walk to the courthouse. Third, fairness is not thwarted by a remand. There is absolutely no suggestion in the record that the parties cannot obtain an equally fair trial before the Jefferson Circuit Court. This case does not present the typical concerns of a case which arises from diversity jurisdiction where often one party is justifiably concerned about being "home towned" in a state court.

Comity is the final factor to be weighed. Defendants' arguments notwithstanding, this factor weighs heavily in favor of remand. Defendants argue that the plaintiffs' state claim pursuant to KRS Chapter 344, involves the same legal

analysis ordinarily involved in the plaintiffs' Title VII claim. Accordingly, defendants conclude that there are not concerns of comity. In other words, the federal court will not be intruding on the traditional role of the state courts by deciding the plaintiffs' state claim for sexual discrimination.

The Magistrate Judge does not disagree with this argument insofar as the plaintiffs' state and federal civil rights claims are concerned. However, the argument ignores the plaintiffs' proposed claim pursuant to Kentucky's "whistleblower" statute, KRS 61.101, et seq. The "whistleblower" statute was recently enacted in 1986. The Magistrate Judge is unaware of any published Kentucky cases which interpret its terms. Therefore, the whistleblower claim raises potential questions of first impression under state

law which are obviously better left to the Kentucky courts.[2]

This conclusion is reinforced by the decision of the Sixth Circuit in Williams v. City of River Rouge, 909 F.2d 151, 157 (6th Cir. 1990). In Williams, a city attorney was dismissed due to his political and personal incompatibility with a newly-elected mayor. He filed suit pursuant to 42 U.S.C. § 1983 alleging a

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[2] The whistleblower claim is raised by the plaintiffs in their tendered amended/supplemental complaint (Docket No. 14), along with a claim for defamation. The Sheriff's office has filed a response to the motion for leave to file an amended supplemental complaint in which it objects primarily on the grounds that the defamation claim is untimely under state law (Docket No. 20). Although the Magistrate Judge has yet to grant leave to the plaintiff to file their amended/supplemental complaint, Rule 15(a) clearly provides that leave to file amended pleadings shall be "liberally granted when justice so requires." Further, defendants have not challenged the whistleblower claim as such in their response. Accordingly, the Magistrate Judge considers it appropriate to weigh the impact of this claim as it relates to the plaintiffs' motion to remand.

violation of his civil rights. The district court held that the attorney's dismissal did not violate the First Amendment and continued to grant summary judgment to the defendant - city on the attorney's pendent state contract claims. On appeal, the Sixth Circuit affirmed the dismissal of the federal civil rights claim, but reversed the grant of summary judgment to the defendants. After finding that genuine issues of material fact existed, the Sixth Circuit reversed and remanded the state contract claims with instructions to the district court to dismiss the contract claims without prejudice.

In so doing, the Sixth Circuit held that:

> Where an action in federal court includes both federal and pendent state claims and the court dismisses the federal claims before trial on a motion for summary judgment, the pendent state claims are ordinarily dismissed as well... Pendent jurisdiction is a doctrine of

> discretion. Gibbs, 383 U.S. at 726, 86 S.Ct. at 1139. In this case, the federal constitutional claims which form the basis for federal jurisdiction over the case, were properly dismissed by summary judgment before trial. Consequently, the contract claims will be dismissed. Moreover, the contract claims require interpretations of the city charter of River Rouge and of Michigan contract law, questions more properly addressed by the Michigan courts.

Williams, 909 F.2d at 157 (numerous citations omitted).

If simple state contract claims such as those in Williams are more properly left to the state courts, then it necessarily follows that claims under a recently enacted and uninterpreted state statute such as KRS 61.101 must be remanded to state court as well. This is dictated by the policy of the Sixth Circuit and the traditional balancing test.

In concluding, the Magistrate Judge addresses the question of manipulation. Defendants argue at length that the plaintiffs are simply attempting to manipulate the federal courts. The

Magistrate Judge does not share this view. It is no more manipulation to argue for remand than it is to originally remove the action from state court to federal court. Both situations obviously involve some tactical advantage for one party or the other. Accordingly, the Magistrate Judge accords little weight to this argument. It is the policy of the Sixth Circuit and the application of the traditional balancing test which require remand.

Accordingly, the Magistrate Judge **orders** that this action be remanded to state court following the timely filing by the plaintiffs of a motion to dismiss their Title VII claim. See Acme Elec. Corp. v. Sigma Instruments, Inc., 121 F.R.D. 26,28 (W.D. N.Y. 1988). (A magistrate judge has authority pursuant to 28 U.S.C. § 636(b)(1)(A) to enter a nondispositive order remanding an action to state court. Such order may be reviewed by the district court

pursuant to the clearly erroneous standard.)

IT IS SO ORDERED THIS 10TH DAY OF AUGUST, 1992.

**ENTERED AUG 10 1992**

JESSIE W. GRIDER, CLERK
BY [SIGNED]
DEPUTY CLERK

[SIGNED]
C. Cleveland Gambill
United States Magistrate Judge

Copies to: Counsel of Record

Nos. 92-6266/6284/6340

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOYCE BENFIELD;

Plaintiff-Appellee,

TINA GIBBS; BETTY WALDRIDGE; JOAN BALL; GLORIA MATTINGLY

Intervening Plaintiffs-Appellees,

V.

JAMES GREENE;

Defendant-Appellant, (92-6284)

LOU BYRON; JEFFERSON COUNTY SHERIFF'S OFFICE

Defendants-Appellants. (92-6266)

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In re: LOU BYRON; JAMES GREENE JEFFERSON COUNTY SHERIFF'S OFFICE

Petitioners. (92-6340)

O R D E R

**FILED DEC 18 1992, LEONARD GREEN, CLERK**

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**
**Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.**
**This notice is to be prominently displayed if this decision is reproduced.**

BEFORE: GUY and NELSON, Circuit Judges; and BROWN, Senior Circuit Judge.

The defendants in this sexual harassment case appeal a district court order granting the plaintiffs' motion to voluntarily dismiss their federal claim under Title VII and remanding the plaintiffs' state claims back to the state court from which they were removed. In the alternative, the defendants seek a writ of mandamus directing the district court to vacate its order of remand. The district court has submitted a copy of its docket sheet in response to the petition for mandamus. The plaintiffs now move to dismiss the defendants' appeals in Cases Nos. 92-6266/6284 and for sanctions. The

defendants have filed a response in opposition to the motions. The defendants move to stay the district court's order of remand pending appeal or review in mandamus. The district court has denied a similar motion.

In Regis Associates v. Rank Hotels, Ltd., 894 F.2d 193, 194 (6th Cir. 1990) this court held that "a remand order is reviewable on appeal when it is based on a substantive decision on the merits of a collateral issue as opposed to just a matter of jurisdiction." In the present case, however, the district court's remand order is not based on a substantive decision, but rather on the granting of a motion by the plaintiffs to voluntarily dismiss their federal cause of action. Under these circumstances, we conclude that review, if available, may only be had pursuant to a petition for a writ of mandamus. See J.O. v. Alton Community Unit

School Dist. 11, 909 F.2d 267, 271 (7th Cir. 1990). Consequently, the defendants' appeals in Cases Nos. 92-6266/6284 must be dismissed for lack of appellate jurisdiction.

If a court of appeals determines that an appeal is frivolous, Rule 38, Fed. R. App. P., permits the court to "award just damages and single or double costs to the appellee." "An appeal is frivolous if it is obviously without merit and is prosecuted for delay, harassment, or other improper purposes." Dallo v. INS, 765 F.2d 581, 589 (6th Cir. 1985). Upon consideration, the court concludes that sanctions are not appropriate in these cases.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. It cannot be used to control a district court in the exercise of

discretionary duties." In re American President Lines, Ltd., 929 F.2d 226, 227 (6th Cir. 1991) (order) (citations omitted). A district court's order granting voluntary dismissal is reviewed for an abuse of discretion. See American Nat. Bank and Trust Co. v. Bic Corp., 931 F.2d 1411, 1412 (10th Cir. 1991). The defendants have not demonstrated a clear and indisputable right to the relief they seek. The court, therefore, concludes that mandamus relief is not warranted.

It is therefore **ORDERED** that the defendants' appeals in Cases Nos. 92-6266 and 92-6284 are dismissed for the reasons set forth herein. To the extent that the plaintiffs' motions to dismiss advance other grounds for dismissal, those motions are rendered moot. The plaintiffs' request for sanctions is denied. It is further **ORDERED** that the defendants' petition for

a writ of mandamus is denied. The defendants' motion for a stay is denied as moot.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk